U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 23Oct2001

CASE NO.: 2000-LHC-1788

OWCP NO.: 07-149172

IN THE MATTER OF:

WENDY MARIE DANOS

Claimant

v.

NORTH AMERICAN SHIPBUILDERS

Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.

Carrier

APPEARANCES:

ARTHUR J. BREWSTER, ESQ.

For the Claimant

MAURICE E. BOSTICK, ESQ.

For the Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et

seq., brought by Wendy Danos (Claimant) against North American Shipbuilders (Employer) and Signal Mutual Indemnity Association, Ltd. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges on March 30, 2000, for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on March 2, 2001, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered six exhibits while Employer proffered twenty-four exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from Claimant and Employer on May 9, 2001. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That an alleged injury/accident occurred on April 20, 1998.

2. That an employee-employer relationship existed at the time of the alleged accident/injury.

3. That Employer filed Notices of Controversion on June 25, 1998 and January 5, 1999.

4. That an Informal Conference was held on February 9, 1999.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-__ .

II. ISSUES

The unresolved issues presented by the parties are:

1. Section 12(a) timeliness.

2. Causation.

3. Nature and extent of Claimant's disability.

4. Maximum medical improvement.

5. Suitable alternative employment.

6. Average weekly wage.

7. Section 7 medical benefits.

8. Section 8(f) Special Fund relief.

9. Attorney's fees.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified she is a high school graduate and has received three months of vocational training in accounting but did not earn a certificate. She is divorced and has a 19 year-old son and 17 year-old son. (Tr. 24). Prior to her work with Employer, Claimant was self-employed "for a few years" as a wallpaper installer for both residential establishments and businesses. She earned "around $4,000" in the "few years" she was self-employed and did not report any of this income for tax purposes. (Tr. 25, 79-80).

In January 1998, Claimant was informed by friends that Employer was hiring and consequently applied for a position as a "roustabout, whatever they had open." She confirmed she filled out a job application with Employer and was given a pre-employment physical examination by Dr. Roger Blanchard with Industrial Health Services. (Tr. 26, 44). During the physical examination, Claimant stated she completed a health

questionnaire, was given an x-ray, and engaged in lift and strength testing. (Tr. 26-27, 51).

In the health questionnaire, Claimant confirmed prior problems with her shoulder, elbow and knee. (Tr. 27; EX-23, p. 39). She told Dr. Blanchard she had overworked her shoulder blade as a result of hanging wallpaper and was being treated by her family doctors, Dr. John LeBlanc, who has recently retired, and Dr. Camille Pitre, who had prescribed soma for her shoulder. (Tr. 28, 65). Claimant confirmed her back left shoulder blade would "bother" her when she would hang wallpaper. She also had numbness in her arm. She testified her doctors told her the bursitis in her left shoulder was the result of a 1975 motor vehicle accident. (Tr. 29, 64).

Also in the health questionnaire, Claimant confirmed she has also been under Dr. Pitre's care during the last three years for anxiety attacks, from which she has been suffering since she graduated from high school. (Tr. 28-29). Dr. Pitre prescribed Valium for her anxiety attacks. (Tr. 29, 66). Claimant confirmed she discussed this condition with Dr. Blanchard. (Tr. 29).

During the physical examination, Claimant told Dr. Blanchard she had been involved in a motor vehicle accident in 1975 and had broken her pelvis for which she was hospitalized seven weeks. She reported she has continuing problems with her lower back due to weather change. (Tr. 30). Upon completion of the pre-employment physical examination, she began work as a roustabout for Employer on January 26, 1998. (Tr. 30-31, 63).

As a roustabout, Claimant testified her duties were to "basically clean up in the boat, the trash, the welding rods; sometimes we'd have to bring down supplies that was (sic) on the boat into the stockroom; we dumped trash into the trash bin and then we'd have to take the trash bin and hook it up to the overhead crane and bring it down; things like that, sweep." She confirmed the position involved heavy lifting as she had to carry steel and iron from the stockroom up and down three flights of stairs because the elevator was being used 90 percent of the time. (Tr. 31). She worked Monday to Thursday from 6:00 a.m. to 5:00 p.m. and on Friday from 6:00 a.m. to 12:00 p.m. (Tr. 32).

On March 12, 1998, Claimant confirmed she went to Employer's medic, Don Cheramie, for pain in her shoulder after having

brought ". . . a lot of parts up and down the stairs and stuff to the stockroom . . ." (Tr. 32; EX-6, p. 1). She explained to Mr. Cheramie that her left shoulder muscle was bothering her after carrying "stuff up on the boat" and she asked for Motrin or Tylenol to relieve the pain so that she could get back to work. (Tr. 33; EX-6). Claimant was given atropine at that time. (Tr. 34; EX-6). She confirmed this shoulder pain was similar to her bursitis. She denied having any problems with her neck in March 1998. (Tr. 34). Claimant further confirmed from the time she started working for Employer, she had difficulty at times performing her job because of the bursitis in her left shoulder and the weakness in her left hand. (Tr. 65).

On March 26, 1998, Claimant returned to the medic for an anxiety attack as she had not brought her medication to work. (Tr. 34; EX-6).

On April 20, 1998, Claimant began work as a carpenter helper in the carpenter crew with Employer. (Tr. 32, 35, 86). As a carpenter helper, Claimant would bring items from the warehouse. (Tr. 35). She was sent to welding school to learn how to tack. Her duties included carrying and tacking in angle iron, floor tracks, ceiling tracks and trim. (Tr. 36). On April 13, 1998, Claimant was seen by the medic for "hypertension" or "flutterings" in her chest. (Tr. 36-37; EX-6).

On the morning of April 21, 1998, Claimant was seen by the medic after having awaken with severe numbness in her arm, tightness in her chest and throat and pain in the back of her neck. (Tr. 37-38, 66; EX-6). On April 20, 1998, she had been carrying angle iron, ceiling tracks, and floor tracks up three flights of stairs because the elevators were not working. (Tr. 83). She stated she had never had pain in her neck before this date. After Claimant checked out with Clarence Hebert, the supervisor of carpenters, Claimant's mother drove her to the emergency room at Lady of the Sea Hospital where she told the emergency room physician, Dr. Crenshaw, she felt like she was having a heart attack. (Tr. 39; EX-14, p. 2).

Before April 20, 1998, Claimant confirmed she never told Mr. Cheramie she had any neck pain. (Tr. 80). Claimant testified she had chest pain before April 21, 1998, but the chest pain she experienced on the morning of April 21, 1998 was "more deep and sharp." (Tr. 86). She emphasized she never had neck pain before April 20, 1998. (Tr. 87). She stated she did not

connect the injury to her work activities on April 20, 1998 because she "thought it was just my shoulder getting worse because of carrying the angle iron." She reported her shoulder never hurt on April 20, 1998. She made the work connection because she had never carried anything above her shoulders before April 20, 1998. (Tr. 88).

The nurse's note indicates Claimant stated she had "left anterior chest pain, radiating to left arm, complains of a 'tightness' to the left neck onset this morning, continuous but increasing in intensity at times; describes episodes as sharp initially and then pressure-type pain; has had episodes times eight months on and off but more episodes this month than usual." Claimant explained she had shoulder blade pain and numbness in her arm for the past eight months. She emphasized the tightness in her neck and throat onset the morning of April 21, 1998. (Tr. 40, 67, 85). She confirmed the chest pain she experienced that morning was the most severe it had ever been. Claimant was informed her complaints were muscular and not cardiac. She was taken off work "for a couple of days" and told to see an orthopaedic doctor. (Tr. 41). On cross-examination, Claimant testified she reported for work the following day and worked ten hours. (Tr. 68).

On April 30, 1998, Claimant went to Dr. Guidry, an orthopaedic surgeon in Houma, Louisiana, for complaints associated with her left shoulder. (Tr. 41-42; CX-1, p. 3). On a medical history questionnaire, she reported she did not answer the questions "where did it occur" and "how did the accident/injury happen" because she had "no idea what was going on." (Tr. 43, 74-75; CX-1, p. 2). She "imagine" she was told during orientation with Employer that all injuries or accidents must immediately be reported. (Tr. 80). She confirmed she told Dr. Guidry about her prior medical treatment by Dr. Pitre. (Tr. 43). Dr. Guidry ordered x-rays and an MRI for Claimant. On the medical history questionnaire, Claimant explained she answered "No" to never having had any prior problems with her shoulder because she considered her shoulder to be part of her arm. (Tr. 42; CX-1, p. 2). She further explained her bursitis was in the shoulder blade on her back. (Tr. 43). Claimant noted the pain in her arm before April 21, 1998 was "much different" than the pain after that date because after April 21, 1998, the pain radiated into her arm down to her hand and up the back of her neck instead of being localized in the shoulder blade area. (Tr. 50).

On May 27, 1998, Claimant confirmed she was seen by the medic at Employer's shipyard for a "cervical strain." (Tr. 59; EX-11). She was administered Motrin for her pain. (Tr. 60; EX-6).

On June 8, 1998, Claimant explained to Bill Underwood, Employer's director of personnel, that she needed a two-week personal leave of absence from work due to her pain. Mr. Underwood approved the two-week leave of absence. (EX-9). Claimant told Mr. Underwood she had hurt her neck but did not know "where it came from." (Tr. 44-46, 72). After receiving the results of the MRI, Dr. Guidry explained to Claimant she had a herniated disc, so he ordered an EMG. The EMG indicated Claimant had a pinched nerve. (Tr. 44).

On June 18, 1998, Dr. Guidry restricted Claimant from working. (Tr. 44, 69). That same day, Claimant filed her claim for workers' compensation benefits from Employer. She stated on the form that her accident had occurred when she was carrying angle iron, floor plates and ceiling tracks and the following day, she had numbness in her left arm and tightness in her neck. (Tr. 47-48; EX-15). Claimant acknowledged she had never told anyone at Employer's shipyard that she considered her condition to be work-related until she discussed her symptoms with a friend and realized the severity of her injury was due to having carried angle iron on her shoulders at work. She stated the only heavy thing she ever carried on her shoulder was angle iron. (Tr. 48-49). She confirmed she was not involved in any accidents or injuries outside of work from the time she was hired with Employer until April 21, 1998. (Tr. 49).

After the EMG, Dr. Guidry referred Claimant to physical therapy which did not improve her complaints. Dr. Guidry then recommended surgery but Claimant was unable to have surgery as she did not have any insurance. (Tr. 53). Claimant reported she has paid her medical bills without assistance from insurance which ended in July 1998. (Tr. 52).

Claimant testified prior to taking the two-week leave of absence on June 8, 1998, she had "a lot" of missed work for non-medical reasons. Specifically, she explained that her supervisor had given her time off from work to repair water pipes at her house. She testified she missed "a lot of time in March 1998" due to having the flu and because of menstrual problems. She denied any missed work from February 1998 to April 20, 1998 for shoulder, arm or neck problems. (Tr. 78).

She confirmed on March 26, 1998 her supervisor sent her to Mr. Underwood and she was written up for excessive absences. She was then informed that her next un-excused absence or tardiness would result in her termination. (Tr. 46, 77; EX-10). Before April 21, 1998, Claimant confirmed she never had any problems carrying out her job duties. (Tr. 84). Claimant did not quit her employment with Employer and has never received a termination notice from Employer. She quit returning to work when Dr. Guidry told her not to return to work. (Tr. 52, 75).

Since she has left work with Employer, Claimant worked as a bartender at Northside Daiquiri in Golden Meadow, Louisiana, and earned about $120 per week from July 1998 to August 1998. (Tr. 53-54, 75). She next worked at Steve's Pub in Galliano, Louisiana, and earned $175 per week from August 15, 1998 to November 5, 1998. (Tr. 75). She again worked for Northside Daiguiri from November 9, 1998 to March 25, 1999, and earned $135 per week. (Tr. 76). She last worked for Night Deposit from April 8, 1999 to May 27, 1999, and earned $200 per week. (Tr. 76). She confirmed Dr. Guidry initially allowed her to do this work as there was no heavy lifting involved. She stopped working on Dr. Guidry's recommendation when she observed it was difficult for her to work considering the medicine she was taking. She has not worked since May 1999. (Tr. 54). Claimant has not been examined by Dr. Guidry since Fall 2000. (Tr. 55).

Claimant testified she went to Chabert Orthopaedic Clinic in Houma, Louisiana, and asked for a doctor referral. (Tr. 56). She was referred to Dr. Radcliff, a neurosurgeon at Charity Hospital in New Orleans, Louisiana. (Tr. 55). Dr. Radcliff ordered a second MRI and recommended surgery. She confirmed she was also examined by Dr. Sweeney at Employer's request. (Tr. 56).

Claimant reported she had a surgical fusion performed at the C5-6 level on January 30, 2001, and is still under Dr. Radcliff's care. She confirmed since Dr. Guidry took her off work in 2000, no doctor has told her that she can return to work of any kind. She also has not received any workers' compensation. She is receiving Medicaid benefits and food stamps. (Tr. 57). She confirmed her arm is still numb even after the surgical fusion. (Tr. 87).

On December 13, 1999, Claimant stated the police searched her house and found "some medication that was not mine, that was for a friend that had gave me some of his medicine, and then

they found paraphernalia and I had a 17-year-old living with me at the time, so they got me for contributing to a juvenile." (Tr. 58). She had a pre-trial intervention and was put on one-year unsupervised probation, which ended February 3, 2001, six hours of community service and a $240.00 fine. (Tr. 58-59).

Claimant confirmed she has met with Carla Seyler, a vocational rehabilitation specialist, about finding work. She testified she is willing to work with Ms. Seyler to find work when her doctors release her to work. (Tr. 60).

Donald Joseph Cheramie

Mr. Cheramie testified he currently works in safety-environmental-quality-production with Bollinger Shipyards. (Tr. 91). He is a licensed emergency medical technician and a surgical technician. (Tr. 101). In 1998, he was the medic and workers' compensation director at Employer's shipyard. As Employer's medic, Mr. Cheramie reported he would tend to the injuries or illnesses of Employer's workers. (Tr. 91). He confirmed he was responsible for reporting any injuries to the Department of Labor. (Tr. 102). He confirmed any time an employee reported any kind of injury or physical complaint, he would complete a medic authorization form. If any medications or treatments are required, then a Daily Shipyard Dispensary Form is completed also. (Tr. 103). He held this position with Employer for "eight, nine years." (Tr. 102).

Mr. Cheramie confirmed he knew Claimant as she worked for Employer as a roustabout and in the carpentry crew and she came into his office on several occasions for treatment. (Tr. 91). He noted Claimant had been cleared by Dr. Blanchard in a pre-employment physical examination and functional capacity assessment, which tests a prospective employee's ability to lift and carry items, to work as a roustabout. (Tr. 105).

He confirmed he wrote a letter to Steve Smith of Lamorte Burns, the adjuster in this matter, on June 25, 1998, and stated Claimant "periodically visited the medic's office on several occasions dating back to February 1998, complaining of pre-existing left shoulder and cervical problems." (Tr. 92, 102; EX-7). He further confirmed he specifically recalled Claimant mentioned she had neck problems prior to April 20, 1998. (Tr. 93). He testified he told Claimant's supervisors and Mr. Underwood that Claimant should not be lifting anything heavy.

(Tr. 104).

Mr. Cheramie did not know why there were no entries in the Daily Shipyard Dispensary forms or why there were no medic authorization passes from February 1998 regarding Claimant's pre-existing left shoulder and cervical problems. (Tr. 103). He noted an accident report is not completed for a non-work-related injury. (Tr. 99).

On March 12, 1998, Claimant was seen by Mr. Cheramie for a pre-existing left shoulder strain. (Tr. 93-94, 97). Mr. Cheramie acknowledged that the Daily Shipyard Dispensary Log of Claimant's left shoulder strain fails to mention it as "pre-existing." (Tr. 106-07; EX-6). The medic authorization pass indicates Claimant's left shoulder strain is pre-existing. (EX-11). He marked "pre-existing" on the medic authorization pass because Claimant told him that her injury was prior to her work with Employer. (Tr. 95). On March 26, 1998, Claimant visited the medic complaining of anxiety. (EX-6). On April 13, 1998, she visited the medic complaining of hypertension. (Tr. 108; EX-6).

On April 21, 1998, Claimant visited the medic complaining of anxiety. (EX-6). Mr. Cheramie stated Claimant would have been cleared by the medic's department to leave the shipyard and go to the emergency room on this day. (Tr. 98, 109). However, Claimant did not tell Mr. Cheramie she was planning to go to the emergency room and Mr. Cheramie testified he did not consider Claimant's situation to be an emergency. (Tr. 117-18). Mr. Cheramie confirmed Claimant never complained of a work-related injury. (Tr. 98).

On May 27, 1998, Claimant was seen for a cervical strain and administered Motrin. A medic authorization pass was issued with complaints of a pre-existing "neck, cervical strain." (EX-11). Mr. Cheramie emphasized Claimant told him that she had hurt her neck prior to working for Employer. (Tr. 95, 98, 114). He testified Claimant had informed him she had been examined by Dr. Guidry for her neck complaints. (Tr. 112).

Mr. Cheramie testified it was his responsibility to inquire of Employer's workers when they sought medical assistance whether their symptoms were job-related. He asked Claimant "if she was picking up something too heavy that would aggravate her neck or her shoulder, and she said no, she always had the burning in her shoulder that would radiate down her arm. And I

also stressed to her that it might be a more serious problem than she probably thinks it is with her shoulder, I told her that she should go back and get her neck checked out because a lot of times you feel it in the arm or the shoulder and it's really coming from the bulk of the problem with the neck." (Tr. 116-17). Mr. Cheramie emphasized Claimant came to the medic several times for Motrin but only the May 27, 1998 Daily Shipyard Dispensary Log indicates Claimant received Motrin. (Tr. 114-15).

Mr. Cheramie confirmed no accident report was ever completed by Claimant until June 18, 1998 when he received a work-related accident report. (Tr. 100). After Claimant filed her accident report, Mr. Cheramie testified he conducted a safety or accident investigation and spoke to one of Claimant's co-workers and two foreman. He inquired whether Claimant was having any problems with her arm, shoulder or cervical area while on the job and reported all three employees denied Claimant ever complained to them about any complaints related to her arm, shoulder or cervical area. (Tr. 112-13). He noted the results of the safety or accident investigation should be at Employer's shipyard. (Tr. 114). No accident or safety report was ever submitted as an exhibit to the instant record.

Bill Underwood

Mr. Underwood testified he is personnel director with Employer and has held that position for "about four years." (Tr. 119-20). He testified his duties include hiring, firing, reprimands, employee training, performing manual interviews, background checks, orientation and "a little with the safety." Mr. Underwood reported all employees at Employer's shipyard are instructed during their job orientation that they are to immediately report any on-the-job injuries. (Tr. 123). He also receives the medical reports from pre-employment physical examinations. (Tr. 127). Mr. Underwood confirmed he knows Claimant and she was given a pre-employment physical examination, which she passed. (Tr. 120, 127).

Mr. Underwood verified he had reprimanded Claimant on March 24, 1998 for missing time by means of a disciplinary action report. He personally informed Claimant she would be terminated if she had another unexcused absence. (Tr. 121, 128; EX-10).

In April and May 1998, Claimant missed some amount of time in a total of 14 days. Mr. Underwood reported Claimant may have missed the whole day, a half-hour or 15 minutes. (Tr. 129). He acknowledged Claimant did in fact miss some time after she was reprimanded in March 1998. He testified she was terminated but he did not know the date of her termination. (Tr. 130). He observed this information should be in Claimant's personnel file. (Tr. 131). After reviewing Claimant's personnel file, Mr. Underwood testified there was nothing in her personnel file to indicate she was terminated. He stated he "just thought she was terminated." (Tr. 133). He reported if Claimant were not terminated, her status would be "out on workers' compensation," regardless of whether she were actually receiving benefits. (Tr. 134).

On June 8, 1998, Mr. Underwood testified Claimant requested a personal, unpaid two-week leave of absence for allegedly hurting her neck in "activities outside the work environment." (Tr. 122; EX-9). He noted Claimant did not indicate how she hurt her neck. (Tr. 123).

Mr. Underwood acknowledged he had written a letter on June 25, 1998, to Mr. Cheramie explaining Claimant's missed work. He noted the letter indicated Claimant missed 13 days out of 20 scheduled days of work in February 1998. He confirmed he did not know why she missed those days. In March 1998, she missed 12 days out of 22 scheduled days. He did not know why she missed those days. (Tr. 120-21, 128; EX-8). He noted Claimant had nine excuse slips from doctors from January 1998 through May 1998. (Tr. 129).

Mr. Underwood confirmed Claimant's position with Employer was classified as "very heavy work" as it "involves repetitive sequences, required balancing, stooping, kneeling, et cetera." Claimant "would exert force on occasion in excess of 100 pounds and/or in excess of 50 pounds of force frequently." (EX-23, p. 6). He reported she was cleared by the shipyard's own physician for very heavy work at Employer's shipyard. (Tr. 131-32).

When Claimant began working for Employer, Mr. Underwood reported she was earning $7.50 per hour. On February 2, 1998, she received an increase to $7.75 per hour and on June 8, 1998, she received an increase to $8.45 per hour. (Tr. 125). Mr. Underwood testified Claimant never earned $8.45 per hour because she never worked passed June 8, 1998. Mr. Underwood reported Claimant earned $3,800.47 from January 26, 1998 to April 20,

1998 and earned a total of $5,724.39 during the time she worked for Employer from January 26, 1998 to June 7, 1998. (Tr. 126; EX-17, p. 1).

The Medical Evidence

Camille C. Pitre, M.D.

Dr. Pitre, a board-certified family practioner, testified by deposition on February 14, 2001. (EX-4, p. 7). Dr. Pitre has been Claimant's family physician since May 1994 and has treated her for chronic anxiety since January 1995. (EX-4, p. 8). Dr. Pitre confirmed Claimant has taken Valium for her anxiety since she was 16 years old. (EX-4, p. 9).

Dr. Pitre observed Claimant had requested in June 1996 a prescription of soma, a muscle relaxant, for pain related to her pelvis, which had been broken "years ago," and had been exacerbated by increased painting and wallpapering. (EX-4, p. 11). Dr. Pitre testified that on February 27, 1997, Claimant reported pain and muscle spasm in her shoulder. Dr. Pitre did not conduct a physical examination of Claimant. She prescribed Valium and Flexeril, a muscle relaxant, to Claimant. (EX-4, p. 14). Dr. Pitre continued to treat Claimant for chronic low back pain until June 16, 1998. (EX-4, pp. 16-18). Claimant called Dr. Pitre's office on May 7, 1998, and was given a refill of soma. Dr. Pitre noted Claimant never complained of any new injuries. (EX-4, pp. 17, 19).

On June 16, 1998, Claimant reported she had been carrying angle iron at work on April 20, 1998, and experienced pain in her left neck and numbness and tingling in her left arm. Claimant stated she had seen two physicians, Dr. Gary Guidry, who diagnosed a ruptured disc in her neck, and Dr. Trahan, a neurologist, and she had underwent an EMG. Claimant noted the Valium and Soma were helping her but she was experiencing increased pain. (EX-4, p. 18).

On November 11, 1998, Dr. Pitre examined Claimant for complaints of "lots of neck spasm and headache." (EX-4, pp. 19-20). Claimant called in for refills of Valium in December 1998 and January 13, 1999. On February 18, 1999, she called in for refills of Lortab. (EX-4, p. 20). Dr. Pitre examined Claimant on February 23, 1999, and refilled her prescriptions of Valium and Lortab. Dr. Pitre noted other physicians had diagnosed

Claimant with a left shoulder strain. Claimant called in for Lortab refills on April 13, 1999 and May 10, 1999. (EX-4, pp. 21-22).

Dr. Pitre monitored and provided medication to Claimant continuously through April 11, 2000, for pain and anxiety symptoms. (EX-4, pp. 22-25).

On April 20, 2000, Dr. Pitre examined Claimant and noted she had seen Drs. Guidry and Trahan and had been diagnosed with a herniated disc at the C5-6 level. Claimant complained of headaches, left neck aching, left arm pain and weakness in her left hand. (EX-4, p. 26). Since she no longer had insurance, Claimant asked Dr. Pitre for assistance in placement in a charity medical system. (EX-4, p. 27). Upon physical examination, Dr. Pitre observed Claimant had decreased range of motion in her neck with pain through testing and there was weakness in her left hand compared to her right. Her deep tendon reflexes were symmetrical bilaterally and there was no cyanosis, clubbing or edema. Dr. Pitre diagnosed cervical disc disease with "neuropathy/radiculopathy" and referred Claimant to an orthopedist. (EX-4, p. 57). She recommended Claimant continue her medications and prescribed Sonata for her insomnia. Dr. Pitre also faxed a referral to Chabert Medical Center, which is a charity medical center. (EX-4, pp. 27-28).

Dr. Pitre examined Claimant on July 6, 2000 for complaints associated with her left shoulder. Claimant reported she could not remove her shirt because of spasm and could not tolerate the medication, Neurontin. She further reported the soma was working better for spasm than Valium. (EX-4, p. 30). Dr. Pitre diagnosed left shoulder spasm and prescribed soma. (EX-4, p. 31).

On August 21, 2000, Dr. Pitre examined Claimant after she had fallen down some steps and was complaining of left arm pain and bruising to her left side. Claimant was unable to move her elbow and could not raise her left arm above horizontal. (EX-4, p. 31). Claimant denied any swelling at the time of this new injury and stated the pain was different than her old pain. Dr. Pitre diagnosed left arm pain, left side pain with contusion and a strain secondary to this fall down the stairs. (EX-4, p. 32).

Dr. Pitre examined Claimant again on July 1, 2000, for pain in her lower pelvic region. Claimant reported the Lortab was not helping her pain so she requested a change to Percocet.

Claimant also stated she had surgery scheduled for December 2000. (EX-4, p. 33).

On December 12, 2000, Dr. Pitre examined Claimant for the final time for pain in her right lower quadrant which radiated into her right groin. Claimant reported she was to have neck surgery on December 19, 2000. (EX-4, pp. 34-35).

Dr. Pitre confirmed that Claimant had a chronic anxiety disorder, chronic back pain and a left shoulder problem before April 20, 1998. She further confirmed Claimant's activities wallpapering and painting exacerbated her pain associated with these problems. (EX-4, pp. 35-36).

Dr. Pitre testified Claimant first complained of pain in her shoulder on February 27, 1997 and did not make another complaint of pain in her left shoulder until June 16, 1998. (EX-4, pp. 38-39). Prior to June 1998, Claimant never complained of neck pain, headaches, left arm weakness and left hand weakness or radiating arm pain. (EX-4, pp. 39-40). Claimant never related her complaints to a work injury. Dr. Pitre confirmed she would defer to Drs. Guidry and Trahan regarding the etiology and treatment of Claimant's cervical spine complaints. Dr. Pitre opined Claimant has not abused the various medications which she has been prescribed during the duration of her treatment with her. (EX-4, p. 40). Dr. Pitre believes Claimant has been truthful in relating her complaints to her during the course of her treatment. (EX-4, pp. 42-43).

Employer's Medic Authorization Forms

On March 12, 1998, Claimant was listed as a roustabout and complained of a "left shoulder strain 'pre-existing'" and was given atropine. On May 27, 1998, Claimant was listed as a carpenter's helper with complaints of neck pain which was "pre-existing." These two medic authorization forms are the only medic authorization forms in the instant record. (EX-11).

Lady of the Sea General Hospital - Emergency Department

Claimant was admitted to the emergency department at Lady of the Sea General Hospital in Galliano, Louisiana, on April 21, 1998 at 1:00 p.m. The Nurse's Note states:

> Patient into ER [complaining of left] anterior chest pain radiating to [left] arm [and] "tightness" to [left] neck onset this [morning] continuous but [high] intensity [at] times. Describes episodes as sharp initially then pressure-type pain. Has had episodes [last 8 months] on and off but more episodes this month than usual.

(EX-14, p. 2).

Claimant's "chief complaint" according to the attending physician's notes was "complains of chest pain off and on for 8 months today . . . describes pain as sharp . . . like." (EX-14, p. 3).

An x-ray of Claimant's chest was performed on April 21, 1998, which was interpreted as normal. (EX-14, p. 11). Claimant was diagnosed as "chest wall pain (non-cardiac)." (EX-14, p. 3).

Gary Guidry, M.D.

Dr. Guidry, a board-certified orthopaedic surgeon, testified by deposition on February 28, 2001. (CX-5). He initially examined Claimant on April 30, 1998 for complaints associated with her left shoulder. Claimant reported she had never had this problem before. (CX-5, p. 6). Dr. Guidry confirmed Claimant told him she was receiving her medications from Dr. Pitre in Galliano, Louisiana. (CX-5, p. 28). She indicated she injured her left shoulder on April 21, 1998, but did not indicate where or how the accident occurred. (CX-1, p. 2; CX-5, p. 7).

During the physical examination, Claimant reported she had some anterior shoulder and neck pain after beginning work as a carpenter's helper with Employer. The examination revealed mild spasm in her neck with a good normal range of motion and a normal neurologic exam. (CX-5, p. 7). Dr. Guidry noted Claimant had full range of motion in her shoulder with no crepitus, or "popping and cracking" sometimes associated with shoulder movement. X-rays of her neck and shoulder were within normal limits. He felt her pain was coming from her neck and radiating into her shoulder. He then ordered an MRI. (CX-5, p. 8).

Dr. Guidry observed Claimant's pain was neuritic in nature, referring into her left upper extremity. He explained she had pain from a pinched nerve. (CX-5, pp. 7-8). After being asked whether an individual with a pre-existing herniated cervical disc at C5-6 would experience shoulder and neck pain from performing heavy manual labor, Dr. Guidry stated "they may well have that symptom, correct." (CX-5, p. 8).

On May 14, 1998, Dr. Guidry examined Claimant and analyzed the results from her MRI. (CX-5, p. 8). He noted left-sided disc herniation at the C5 level which was significant enough to cause some ventral or anterior cord compression. Because of her continued symptoms in her left arm and upper extremity, he recommended she have an EMG performed. (CX-5, p. 9).

Dr. Guidry observed the MRI findings indicated there was evidence of degenerative disc disease along with a disc herniation. (CX-5, p. 10). Dr. Guidry opined the herniation indicated some type of trauma. He noted a cervical MRI will most often show some evidence of degeneration. "But in my opinion, the herniated disc to the left probably represents a traumatic episode. Most often cervical disc disease manifests by single traumatic episode to cause the disc to rupture. I don't have a specific single traumatic episode in [Claimant's] case. She did not tell me she lifted something. She must have told the tech who fills this out, but I don't have any details on a lifting injury." Dr. Guidry confirmed Claimant probably had a pre-existing degenerative disc problem in her neck and a specific event may have caused her diseased disc to rupture. (CX-5, p. 11).

Dr. Guidry further noted if the findings in Claimant's neck were due solely to degenerative changes, "it's often the case where you'll have changes at more than one level." As she had degenerative changes at only one level with a rather "sizeable protrusion," he confirmed it is more likely than not that the disc herniation is the result of some traumatic event superimposed on a degenerative condition. (CX-5, p. 26). Dr. Guidry testified it is not possible from the MRI alone to determine when Claimant developed her condition. (CX-5, p. 12).

Dr. Guidry reported a broad-based central and left paracentral disc herniation of the protrusion type at the C5-6 level, resulting in mild ventral cord compression, renders symptoms of neck pain, headaches, pain referring in the left upper extremity, perhaps some numbness and perhaps some

weakness. (CX-5, pp. 12-13). He reported this condition "could" cause left arm numbness, left arm or hand weakness, pain radiating into the left arm, tightness on the left side of the neck and posterior left shoulder pain. (CX-5, p. 13).

Dr. Guidry remarked the EMG findings were "relatively mild and are indicative of pathology involving the left C6 root. . ." He asked Dr. Trahan, the neurologist who conducted the EMG, how long Claimant's condition had been there and he could not remember what the neurologist told him. He reported Dr. Trahan usually records longstanding, or chronic, problems in his report. (CX-5, p. 14). Although, he would defer to Dr. Trahan as to the length of time of Claimant's condition. Dr. Guidry further noted it can take as long as six weeks for physiologic changes in the nerve root to be detected on an EMG study. (CX-5, p. 15).

Dr. Guidry confirmed he restricted Claimant from work on June 18, 1998. An August 12, 1998 note indicates Claimant told Dr. Guidry shortly after beginning work as a carpenter's helper, she experienced anterior shoulder and neck pain. (CX-5, p. 16). Assuming Claimant had no prior neck problems before working as a carpenter's helper, he opined her complaints were related to her work as a carpenter's helper. (CX-5, pp. 16-17, 25).

On February 4, 1999, Dr. Guidry examined Claimant for complaints of neck pain. She reported she had no intervening trauma since August 1998 and had been working as a barmaid. Physical examination revealed mild spasm in her neck with mild limitation of motion which was about 80 percent of normal. He prescribed Lortab for her pain. (CX-5, p. 17).

Dr. Guidry testified Claimant told him on March 4, 1999 she had quit her job as a bartender because of her neck pain. (CX-5, p. 20). He took her off of all work at that time. (CX-5, p. 21).

On April 28, 1999, Dr. Guidry wrote Claimant recommending she not perform "full time" work. (CX-1, p. 7). He explained she should not perform heavy lifting but he opined she could work part-time as a barmaid passing out drinks with no overhead work. (CX-5, pp. 18-20). On June 30, 1999, Dr. Guidry reported Claimant was temporarily totally disabled and restricted her from all work due to her neck pain. (CX-5, p. 21). Dr. Guidry reiterated Claimant cannot perform "full-time work at this point" in a letter on September 8, 1999 "for food stamp

purposes." (CX-1, p. 10; CX-5, pp. 21-22). He was not aware she had neck surgery in January 2001. (CX-5, p. 22).

Assuming there was a solid fusion, Dr. Guidry estimated a patient could return to light duty work about two months post-operatively and would reach maximum medical improvement about six to eight months post-operatively. (CX-5, pp. 23-24). He would place a ten-pound lifting restriction on her post-operatively. (CX-5, p. 24). As for permanent physical restrictions at the time of maximum medical improvement, he would place a 25-pound lifting restriction on Claimant. (CX-5, pp. 24-25).

Assuming Claimant had bursitis[2] in her left shoulder before she began working for Employer, Dr. Guidry observed bursitis does not cause any type of cervical disc disease or degenerative condition and he would not relate the left shoulder bursitis in any way to Claimant's neck problems. (CX-5, pp. 29-30).

Dr. Guidry confirmed Claimant's activities of carrying angle iron up and down stairs for several hours on April 20, 1998, which caused her neck and arm pain, would have aggravated any pre-existing degenerative disc disease. (CX-5, pp. 34-35). He stated given the size of Claimant's disc herniation, he would expect some complaints of pain to be present sometime in close proximity to the time the disc ruptured. (CX-5, p. 32).

John Sweeney, M.D.

Dr. Sweeney, a board-certified orthopaedic surgeon with a certification in hand surgery, testified by deposition on February 12, 2001. (EX-2). He examined Claimant at the request of Employer/Carrier's counsel on October 19, 2000 after reviewing the notes of Dr. Pitre from 1998, a May 28, 1998 EMG, a May 5, 1998 MRI and the notes of Dr. Guidry from April 1998. (EX-2, p. 5; EX-3, p. 47).

Dr. Sweeney testified he agreed with the radiologists' assessment of the May 5, 1998 MRI which indicated "there is evidence of degenerative disease primarily of C5/6 that is

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[2] Dr. Guidry explained bursitis is an inflammation of the bursa, which are fluid-filled sacs, between the muscles and joints. He stated bursitis of the shoulder would be related to repetitive overhead work. (CX-5, p. 29).

characterized by a central and left paracentral herniation of the protrusion type, which results in mild left ventral cord impingement." (EX-2, pp. 5-6). He explained degenerative disease in the cervical spine is "a process of wear and tear, with progressive loss of the disc and its ability to absorb shock and to provide motion, and then a series of things that occur, such as bone spurs around the surrounding joints." (EX-2, p. 7). He further explained degenerative disc disease is a chronic situation which usually arises from the natural aging process. He noted sometimes a traumatic event can accelerate it. In Claimant's case, Dr. Sweeney reported the MRI findings were most characteristic of degenerative changes, and not from an acute accident, due to the appearance of the disc. (EX-2, p. 8).

Dr. Sweeney noted one method used to determine how long a disc herniation has been present is to ascertain when the symptoms began. Dr. Sweeney agreed symptoms of C5-6 herniation on the left include pain or weakness in the left arm and left hand. (EX-2, p. 9). He also noted left-sided neck pain is another symptom of C5-6 left-sided herniation. (EX-2, p. 10).

Dr. Sweeney confirmed that it is possible to determine from a history when symptoms began if a particular situation or pathology was aggravated. (EX-2, p. 10). He observed Claimant told him she had chronic severe problems with her head, neck, arm and shoulder since April 1998. She stated she did not have a specific injury but began having discomfort in her shoulder and neck a short time after beginning to work for Employer. She further stated her pain had worsened and she had weakness and numbness in her left arm. (EX-2, p. 11). Claimant provided a history which included a pelvic fracture and recurrent bursitis and pain in her left shoulder but she denied any problems with her neck and arm before April 1998. (EX-2, p. 12). Based on this information, Dr. Sweeney testified it would be logical to conclude Claimant had an exacerbation of her pre-existing degenerative disc disease in April 1998. (EX-2, pp. 12-13).

Dr. Sweeney diagnosed Claimant with cervical radiculopathy, chronic secondary degenerative disc disease with C6 root compression based on the objective findings. Based on Claimant's long trial of conservative treatment, Dr. Sweeney opined she was a candidate for cervical fusion surgery and referral to a neurosurgical opinion from Charity Hospital in New Orleans, Louisiana. (EX-2, p. 13). Dr. Sweeney opined the etiology of her disc radiculopathy was related to the

degenerative disc disease and not from an acute pathology as there was no traumatic event which Claimant could relate to cause her neck problems. (EX-2, p. 14).

After reading the Nurses' Notes from the April 21, 1998 Lady of the Sea General Hospital Emergency Department, Dr. Sweeney stated it would be reasonable to presume that Claimant had degenerative disc disease at the C5-6 level eight months before April 21, 1998. (EX-2, p. 15). Dr. Sweeney acknowledged this information contradicts the information provided by Claimant as to when her left arm and hand weakness began. (EX-2, p. 17). Dr. Sweeney confirmed that Claimant's complaints of more "episodes" in April 1998 "than usual" is not consistent with an acute exacerbation of degenerative disc disease. (EX-2, p. 37).

Dr. Sweeney testified it is more probable than not that Claimant had degenerative disc disease at C5-6 eight months prior to April 21, 1998. He stated if Claimant has degenerative disc disease at the C5-6 level, he would expect Claimant to have increased symptoms if she performs heavy manual labor all day. (EX-2, p. 16). Dr. Sweeney opined, based on his evaluation of Claimant, the medical records from Lady of the Sea Hospital, Claimant's testimony, the MRI report and the absence of a history of a traumatic event, that Claimant's degenerative disc disease at the C5-6 level is chronic and pre-existing as of April 1998 and not related to a traumatic event or an aggravation. (EX-2, pp. 17-18). Dr. Sweeney concluded that Claimant's need for cervical surgery is not related to work she performed on April 21, 1998. (EX-2, p. 18).

Dr. Sweeney opined barring any surgical complications for "less-than-usual recovery events," a patient can return to light duty work with a cervical collar within a few weeks after neck surgery. (EX-2, p. 19). When asked to assume that Claimant sustained a cervical condition at work or aggravated a pre-existing condition at work on April 21, 1998, and prior to April 21, 1998, she had a chronic back problem, chronic anxiety disorder, chronic left shoulder bursitis, and a prior fracture of the sacrum and pelvis, he confirmed Claimant's current disability is materially and substantially greater because of her pre-existing condition than her disability would have been from her cervical condition alone. (EX-2, p. 20).

On cross-examination, Dr. Sweeney observed left shoulder bursitis can result from the overhead work associated with wallpapering. He noted bursitis in the left shoulder rarely

causes neck pain. (EX-2, p. 23). Dr. Sweeney testified pain in the back of the shoulder is more frequently related to cervical problems than to bursitis problems "because of the referral pattern from the neck." (EX-2, p. 26). Based on Claimant's complaints and the medical records of Lady of the Sea Hospital, Dr. Sweeney confirmed "it's more likely than not that she sustained at least aggravation of her prior cervical condition." (EX-2, p. 28).

Dr. Sweeney explained Claimant's aggravation is not permanent because "the main problem with her neck is degenerative disc disease. And I don't have any evidence to indicate that there was a new event that would have exacerbated that or permanently affected that, other than her subjective symptoms, which I don't believe would bear all of the strengths of that opinion." (EX-2, p. 29).

When asked to assume that Claimant's history is correct and she had been carrying angle iron on a repetitive basis on April 20, 1998, Dr. Sweeney stated "in the absence of a demonstrated traumatic event, I would still stick with my opinion that it's more likely chronic." (EX-2, p. 30). He continued "the act of lifting something heavy without associated traumatic component, I think, is not likely to have permanently affected the disc C5 and 6." He further noted "a single-lifting heavy-lifting episode can aggravate or cause disc pathology, but it's not insidious an onset. Usually it's a single event that the patient recognizes as the main event; which, again, is not consistent with what I recorded." (EX-2, p. 31).

Medical Center of Louisiana - Charity Hospital

Claimant was admitted to Charity Hospital in New Orleans, Louisiana, on January 30, 2001, with a pre-operative diagnosis of "herniated disc at C5-6." An anterior cervical diskectomy and fusion at the C5-6 level was performed that morning. (CX-6, p. 25). She was discharged on January 31, 2001, and prescribed Lortab "as needed for pain." She was also given a cervical collar to wear while awake. (CX-6, p. 23).

Claimant returned to Charity Hospital on February 13, 2001, for a follow-up examination. She stated the pain in her neck and collar bone was relieved since the surgery, but she still had some pain in her shoulder. She was wearing her cervical collar. She was told to continue wearing her cervical collar

while awake and was given a prescription of Lortab. (CX-6, p. 91).

The Vocational Evidence

Carla D. Seyler

Ms. Seyler, a vocational rehabilitation counselor, testified by deposition on February 21, 2001. (EX-24). She conducted an initial vocational evaluation of Claimant on February 9, 2001, and provided an amended vocational evaluation on February 19, 2001, after meeting with Claimant on February 16, 2001. Ms. Seyler based her vocational evaluation on her interview of Claimant, Claimant's deposition, the medical records of Charity Hospital, Open MRI of Louisiana, Drs. Trahan and Pitre, Lady of the Sea General Hospital, South Lafourche Rehabilitation Service, Houma Orthopedic Clinic, Employer's accident report and Claimant's tax returns. (EX-13, p. 1; EX-24, p. 7).

In her labor market survey report of February 9, 2001, Ms. Seyler first identified a position with Wal-Mart in Galliano, Louisiana, as an optician earning $6.00 to $6.50 per hour. Lifting was up to 10 pounds and there was no overhead reaching or overhead lifting required. (EX-13, p. 4; EX-24, p. 8).

Ms. Seyler next identified a position with Piccadilly Cafeteria in Houma, Louisiana, as a checker/cashier earning $5.15 per hour. The position was mainly sedentary with standing and walking occasionally throughout the day. There was no lifting over 10 to 15 pounds and no overhead lifting or overhead reaching required. (EX-13, p. 4; EX-24, p. 9).

A position as an answering service clerk with A-1 Answering/Medical Services earning $5.15 per hour was next identified. This was a sedentary position with no overhead lifting or overhead reaching involved. "The lifting should not exceed 10 pounds." (EX-13, p. 4; EX-24, p. 11).

Ms. Seyler identified a position with Terrebonne General Hospital in Houma, Louisiana, of an unarmed security guard earning "at least $5.50 per hour." The position required patrolling a hospital and hospital grounds in order to guard the area against theft, vandalism, fire and illegal entry. The applicant must be eligible for commission with Terrebone Parish Sheriff's Office (i.e., have a clean police record). The

position permitted alternating sitting, standing and walking with “no heavy lifting required. There is no lifting overhead or reaching overhead. The individual must have the ability to act quickly in emergency situations and demonstrate authority when needed.” (EX-13, p. 5; EX-24, p. 11).

Lastly, a position as an inside salesperson with The Workout Company in Houma, Louisiana, was identified paying $6.00 per hour plus commission and bonuses. The position required giving tours of a gym with potential customers, showing and explaining exercise equipment. Alternating standing, walking and sitting is required. “It is not necessary to lift significant weight using the equipment during her demonstration. She will walk to give tours of the facility. There is no overhead lifting or overhead reaching required.” (EX-13, p. 5; EX-24, p. 12).

Ms. Seyler also testified that Claimant expressed an interest in accounting and bookkeeping and she believed Claimant could obtain an entry level position in that area and earn between $5.15 and $6.50 per hour. She reported Claimant could pursue retraining at Louisiana Technical College in Houma, Louisiana, and thereafter, earn $8.40 in the Houma area performing bookkeeping, accounting and auditing. (EX-13, pp. 8-9; EX-24, p. 13).

After interviewing Claimant, Ms. Seyler stated in her February 19, 2001 addendum “I believe Ms. Danos is employable in any of the jobs I identified in my [February 9, 2001] report. I believe her entry level wage earning capacity is $5.15 to $6.50 per hour in these jobs or other similar.” (EX-13, p. 8; EX-24, p. 13).

The Contentions of the Parties

Claimant contends that Employer was given timely notice of her injury within 30 days of Claimant becoming aware of the connectivity between her job and her injury. She further contends she is temporarily and totally disabled from June 8, 1998 and continuing after she sustained a new injury to her cervical spine on April 20, 1998. She further argues she is entitled to continuing medical benefits and all unpaid medical bills and her average weekly wage is $350.92 under Section 10(c).

Employer/Carrier, on the other hand, initially contend that Claimant's cervical condition pre-existed her alleged April 20, 1998 work accident with Employer. Employer/Carrier alternatively argue Claimant failed to give timely notice to Employer pursuant to Section 12(a). Employer/Carrier next argue Claimant's average weekly wage under Section 10(c) is $316.70 and suitable alternative employment has been established. Alternatively, Employer/Carrier assert they are entitled Section 8(f) Special Fund relief because of Claimant's numerous pre-existing medical conditions.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Section 12(a) Timeliness

Section 12(a) of the Act provides:

> (a) Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is

> aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment, except that in the case of an occupational disease which does not immediately result in a disability or death, such notice shall be given within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. Notice shall be given (1) to the deputy commissioner in the compensation district in which the injury or death occurred, and (2) to the employer.

33 U.S.C. § 12(a).

Section 12(a) of the Act provides that notice of an injury for which compensation is payable must be given within 30 days after injury, or within 30 days after the employee is aware of, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of, a relationship between the injury and the employment. Kashuba v. Legion Ins. Co., 139 F.3d 1273, 1275-76, 32 BRBS 62 (CRT) (9th Cir. 1998), cert. denied 525 U.S. 1102 (1999); Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990); Sheek v. General Dynamics Corp., 18 BRBS 1 (1985), on recon., 18 BRBS 151 (1986).

Under Section 20(b) of the Act, it is presumed that sufficient notice of a claim has been given, absent substantial evidence to the contrary. 33 U.S.C. § 920(b); see Kashuba, supra. Therefore, the burden is on the employer to establish by substantial evidence that it was prejudiced by the claimant's failure to give timely notice of the injury. See Kashuba, supra; Bivens, supra. Prejudice under Section 12(d)(2) is established when the employer provides substantial evidence that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the injury or to provide medical services. A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer's burden of proof. Bustillo v. Southwest Marine, Inc., 33 BRBS 15, 16-17 (1999); ITO Corp. v. Director, OWCP [Aples],

883 F.2d 422, 424, 22 BRBS 126 (CRT) (5th Cir. 1989).

An administrative law judge is acting within proper authority when determining whether or not a claimant failed to meet the notice requirements of Section 12. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986).

In the instant case, Claimant contends she was injured on April 20, 1998, after lifting and carrying angle iron at work. She did not file her claim for worker's compensation until June 18, 1998, almost two months after her alleged work accident. Employer/Carrier argue they were prejudiced by Claimant's failure to provide notice of an alleged work-related injury for 60 days. Employer/Carrier assert had Claimant timely reported the accident, an accident report would have been immediately completed and an investigation performed. Because of the two-month delay, Employer/Carrier contend they were not able to have Claimant examined by their choice of physician immediately and were not able to investigate the incident contemporaneously with the allegation.

Claimant admits that she did not initially connect her symptoms to her work but asserts she did not become aware of the connectivity between her injury and her work with Employer until June 18, 1998, when Dr. Guidry took her off of work and she had a conversation with a friend whose husband suffered similar symptoms after lifting heavy items. Therefore, as soon as she made the connection, she filed her report of injury with Employer. Claimant further argues Employer/Carrier have presented no evidence that they suffered prejudice by her two-month delay in filing her report of injury.

I find Employer/Carrier were not prejudiced by Claimant's two-month delay in filing her claim for worker's compensation benefits and are therefore precluded from utilizing Section 12(a) of the Act as a defense. Employer/Carrier requested Claimant be examined by the physician of their choice, Dr. Sweeney. Claimant readily submitted to an examination by Dr. Sweeney on October 19, 2000, and Employer/Carrier offered his report and findings into the record in this matter. Employer/Carrier argue Dr. Sweeney was not immediately able to examine Claimant because of the two-month delay. I find this argument is without merit as Dr. Sweeney was able to render a complete and thorough examination of Claimant. Moreover, Dr. Sweeney never reported the over two-year delay from the time of the alleged incident until his examination of Claimant

encumbered his ability to render a diagnosis of Claimant's conditions. Furthermore, Employer/Carrier never explained why Claimant was not examined immediately after notice rather than over two years later. Employer/Carrier also argue that Claimant's delay pre-empted Employer from making an investigation contemporaneously with the alleged incident. I note Mr. Cheramie testified he conducted an investigation of Claimant's allegations after she filed her report of injury by interviewing Claimant's co-workers. I further note Employer/Carrier failed to offer this report into evidence. Therefore, I find this argument is without merit. Accordingly, I find Employer/Carrier were not prejudiced by Claimant's two-month delay in filing her claim for worker's compensation benefits.

B. Credibility

Employer/Carrier vigorously attack Claimant's credibility in this matter. Many of the specific attacks are tied into the testimonial and medical analyses, which will be dealt with in the following discussion. However, I note Employer/Carrier's attack on Claimant's veracity is based on her criminal history.

Claimant acknowledged at the hearing she had been arrested on December 13, 1999 when the police found "medicine" and paraphernalia in her house when a 17-year-old was living with her. She admitted she was charged with "contributing to a juvenile" and had a pre-trial intervention. Her punishment was one-year unsupervised probation, which ended February 3, 2001, six hours of community service and a $240.00 fine. I find Claimant has proffered an adequate and forthcoming explanation of her negative criminal history.

Impeachment by evidence of conviction of a crime is premised on a belief that the witness's criminal past is indicative of a dishonest character or a willingness to flaunt the law. Federal Rules of Evidence, Rule 609 (1995). Rule 609(a)(2) prescribes impeachment of a witness when dishonesty or false statement are involved. Claimant's conviction clearly does not involve dishonesty or false statements which are terms defined very narrowly. I further find that the invocation of the balancing test of Rule 609(a)(1) is not persuasive since the value of Claimant's conviction is outweighed by a danger of unfair prejudice, confusion which exists in the record by the absence of evidence of the punishable time of imprisonment for

Claimant's crime, and the lack of impeachment value of the crime which has little probative value related to Claimant's veracity. Accordingly, I find Claimant is not incredulous based solely on her criminal history.

C. Prima Facie Case

Section 20(a) of the Act, 33 U.S.C. Section 920(a), creates a presumption that a claimant's disabling condition is causally related to his employment. In order to invoke the Section 20(a) presumption, a claimant must prove that she suffered a harm and that conditions existed at work or an accident occurred at work that could have caused, aggravated or accelerated the condition. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990).

A claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).

In the present matter, Claimant has established sufficient evidence to invoke the Section 20(a) presumption. Substantial medical evidence establishes that Claimant sustained an injury to her cervical spine at work on April 20, 1998. Claimant has consistently complained of pain in her neck since carrying angle iron at work on April 20, 1998. Dr. Guidry credibly opined Claimant's work activities could have aggravated any pre-existing degenerative changes in Claimant's cervical spine.

Thus, Claimant has established a prima facie case that she suffered an "injury" under the Act, having established that she suffered a harm or pain as a result of her work activities of April 20, 1998, and that her working conditions and activities could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary which establishes that the claimant's employment did not cause, contribute to or aggravate his condition. James v. Pate Stevedoring Co., 22 BRBS 271 (1989); Peterson v. General

Dynamics Corp., 25 BRBS 71 (1991); see also Conoco, Inc. v. Director, OWCP, 194 F.3d 684, 690, 33 BRBS 187, 191 (CRT) (5th Cir. 1999). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. E & L Transport Co. v. N.L.R.B., 85 F.3d 1258 (7th Cir. 1996).

An employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, the employer must establish that the claimant's condition was not caused or aggravated by her employment. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986).

In the instant case, Employer/Carrier have presented substantial countervailing evidence to rebut the presumption that Claimant's employment did not cause, contribute to, or aggravate her condition.

Employer/Carrier presented the medical records and testimony of Dr. Sweeney to rebut the Section 20(a) presumption. After reviewing the Lady of the Sea emergency department notes and Claimant's testimony, Dr. Sweeney emphasized Claimant was suffering from a chronic, pre-existing degenerative disc disease at the C5-6 level which was not related to a traumatic event in April 1998. Because Employer/Carrier have presented substantial countervailing evidence through Dr. Sweeney's opinion to rebut the presumption that Claimant's employment did not cause, contribute to, or aggravate her condition, Employer/Carrier have met their burden in rebutting the Section 20(a) presumption. See James, supra.

Once the Section 20(a) presumption is rebutted, it falls out of the case and the administrative law judge must then weigh all the evidence and resolve the case based on the record as a whole. Noble Drilling Co. v. Drake, 795 F.2d 478 (5th Cir. 1986); Hislop v. Marine Terminals Corp., 14 BRBS 927 (1982). This rule is an application of the "bursting bubble" theory of evidentiary presumptions, derived from the United States Supreme Court's interpretation of Section 20(d) of the Act. See Del

Vecchio v. Bowers, 296 U.S. 280 (1935); see also Brennan v. Bethlehem Steel Corp., 7 BRBS 947 (1978) (applying Del Vecchio to Section 20(a)).

In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the administrative law judge to accept or reject all or any part of any testimony according to his judgment. Poole v. National Steel & Shipbuilding Co., 11 BRBS 390 (1979).

In light of the medical and testimonial evidence, I find Claimant has met her burden under the Act in establishing that she suffered an aggravation injury at work on April 20, 1998.

If a claimant's employment aggravates a non-work-related, underlying disease or condition so as to produce incapacitating symptoms, the resulting disability is compensable. See Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).

Thus, if the disability results from the natural progression of an injury, and would have occurred notwithstanding the presence of a second injury, liability for the disability must be assumed by the employer or carrier for which the claimant was working when she was first injured; however, under the "aggravation rule," if the second injury aggravates the claimant's prior injury, thus further disabling claimant, the second injury is the compensable injury, and liability therefor must be assumed by the employer or carrier for whom claimant was working when "reinjured." Strachan Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc), aff'g 15 BRBS 386 (1983); Abbott v. Dillingham Marine & Mfg. Co., 14 BRBS 453 (1981), aff'd mem. sub nom. Willamette Iron & Steel Co. v. OWCP, 698 F.2d 1235 (9th Cir. 1982); Johnson v. Ingalls Shipbuilding, Inc., 22 BRBS 160, 162 (1989).

Initially, Employer/Carrier argue that Claimant's testimony was incredulous as, they aver, she did not truthfully relate her medical history to the examining physicians in this matter and until June 18, 1998, she consistently told Employer's personnel director and medic that her symptoms were not work-related.

Employer/Carrier point out that on April 21, 1998, the day after her alleged accident, Claimant told the nurse at Lady of the Sea General Hospital that she had chest pain radiating into her left arm with tightness in her left neck which onset that morning. There was increased intensity at times with the episodes sharp initially then pressure-type pain. She stated she had been having these episodes on and off for the last eight months but more episodes in April 1998 than usual. Employer/Carrier assert Claimant's statement that she had been having these episodes on and off for the last eight months before April 21, 1998, indicates Claimant's condition pre-exists her work with Employer, which began on January 26, 1998.

When asked about her statement to the nurse on April 21, 1998, Claimant provided uncontroverted testimony that she had indeed experienced pain in her left shoulder blade and numbness in her arm for eight months prior to April 21, 1998; however, the tightness in her neck began the morning of April 21, 1998. She further explained the pain she experienced that morning in her arm was the most severe pain she had ever endured. Furthermore, the attending physician's notes reveal that Claimant reported chest pains on and off for eight months not specifically neck pain for that time duration.

Moreover, Claimant testified she did not report a work-related injury to Mr. Underwood when she asked for a two-week leave of absence or to Mr. Cheramie when she visited Employer's medic because she did not realize her symptoms were work-related until June 18, 1998, after she received the results of an MRI, an EMG and talked to a friend whose husband had similar complaints from lifting heavy items. She reported the only time she lifted heavy items was at work and she then connected the onset of her symptoms to April 20, 1998, the day she carried angle iron, floor plates and ceiling tracks at work. Therefore, I find that Claimant has provided adequate and credible explanations for the alleged inconsistencies in her testimony. Accordingly, I find and conclude that Claimant was truthful in relating her symptoms to the nurse at Lady of the Sea General Hospital, Mr. Cheramie and Mr. Underwood.

Employer/Carrier next contend that Claimant's April 30, 1998 answers on Dr. Guidry's medical history questionnaire are inconsistent with her testimony. Employer/Carrier note Claimant stated she was at Dr. Guidry's office for a new injury to her left shoulder. Employer/Carrier further note although Claimant reported her injury occurred on April 21, 1998, she did not

indicate where or how the accident occurred.

When Claimant was asked about these apparent inconsistencies during the hearing in this matter, she explained her documented history of left shoulder bursitis caused pain in her shoulder blade on her back; whereas the pain she experienced with her left shoulder after April 20, 1998, radiated into the back of her neck and down her arm to her hand. She further explained that she did not indicate on the medical history questionnaire where or how the accident occurred because she had "no idea" at that time what was wrong with her. I find this explanation adequate to resolve Claimant's allegedly inconsistent answers on her medical history questionnaire. Therefore, I find and conclude that Claimant was credibly forthcoming in relating her condition to Dr. Guidry.

Employer/Carrier next point out that Claimant had pre-existing left shoulder bursitis, related to her prior work as a wallpaper installer and for which she was receiving pain medication from Dr. Pitre before she started working for Employer. Employer/Carrier note that the bursitis caused her to "occasionally" visit the medic for pain medication and prevented her "on occasion" from performing her job duties with Employer. Employer/Carrier further note that Claimant complained of arm numbness prior to April 20, 1998, and Claimant's own physician, Dr. Guidry, testified that arm numbness is a symptom of a herniated cervical disc.

Furthermore, Employer/Carrier observed Claimant missed 25 days of work in February and March 1998. Employer/Carrier aver Claimant missed this time due to her pre-existing medical problems. Employer/Carrier further observed Claimant had been reprimanded for her excessive absences and her next un-excused absence would have resulted in her termination. Accordingly, Employer/Carrier contend Claimant had an incentive to file a worker's compensation claim against Employer.

Claimant admits that she suffered from left shoulder bursitis pre-existing her work with Employer and further admits the bursitis impeded her ability to perform her job duties. The record indicates Claimant made two visits to Employer's medic for left shoulder pain and she was administered medications. Although Claimant complained of arm numbness prior to April 20, 1998, she testified the severity of her symptoms after April 20, 1998 was greater and her complaints after April 20, 1998 included her neck for the first time.

Claimant explained she missed time on 25 days of work in February and March 1998 due to plumbing problems, the flu and menstrual problems. She testified she is a single mother and was required to attend to these problems on her own. Mr. Underwood noted Claimant did not miss 25 days of work, rather she missed time on 25 different days of work. The amount of time she missed during those 25 days is not evident from the instant record. Mr. Underwood reported he issued a written reprimand to Claimant stating her next un-excused absence would result in her termination. However, Mr. Underwood acknowledged that Claimant in fact missed time after this reprimand and was not terminated for which he had no explanation. Mr. Underwood was also under the impression that Claimant had already been terminated by Employer and testified that evidence of her termination would be in her personnel file. After reviewing Claimant's personnel file, Mr. Underwood was unable to provide any documentary evidence of Claimant's termination. Therefore, I find that Claimant provided adequate and credible explanations for her absences from work on 25 days in February and March 1998. Moreover, the submitted record indicates Claimant visited the medic on the few occasions when her pre-existing left shoulder bursitis prevented her from performing her work for Employer.

Employer/Carrier argue Claimant told Mr. Cheramie that she had neck problems pre-existing April 20, 1998. Employer/Carrier further argue before June 18, 1998, Claimant never mentioned to anyone at Employer's shipyard that she had a work-related neck injury. Employer/Carrier note that Mr. Cheramie asked Claimant if she was lifting anything which was aggravating her neck or shoulder and Claimant stated she always had a burning in her shoulder radiating down her arm. Employer/Carrier further note the May 27, 1998 medic authorization pass indicates Claimant had a cervical strain pre-existing her work with Employer.

Claimant argues she indeed had a documented left shoulder problem before April 20, 1998, but she never complained of cervical or neck problems before April 20, 1998, and Employer's records do not indicate she ever complained of neck or cervical problems before that date. Claimant asserts she never complained of a cervical or neck problem to anyone before April 20, 1998. Claimant was consistent in reporting her physical complaints to Mr. Cheramie and he kept records of those complaints which have been submitted in this matter. Contrary to Mr. Cheramie's testimony that Claimant reported pre-existing cervical problems before April 20, 1998, the Employer's Daily

Shipyard Dispensary Log and medic authorization passes fail to support such an assertion. The only supportive evidence of a cervical strain appears in a post-injury medic authorization pass. I do not credit Mr. Cheramie's testimony that Claimant informed him she had hurt her neck before being employed by Employer for which she had been treating with Dr. Guidry. Dr. Guidry's records confirm he had not treated Claimant for a neck problem before April 20, 1998. Moreover, Dr. Pitre affirmed that Claimant never complained of neck problems before June 1998. Therefore, in the absence of credible evidence to the contrary, I find that Claimant did not report cervical problems to Mr. Cheramie before April 20, 1998.

Employer/Carrier point out that Dr. Sweeney agreed with the radiologists' assessment of the May 5, 1998 MRI which showed evidence of degenerative disc disease primarily at the C5-6 level. He explained that degenerative disc disease is the progressive loss of the disc which is a natural aging process and not related to an acute trauma. He noted the MRI showed degenerative changes and not changes from an acute accident.

Dr. Sweeney testified the symptoms of a left-sided C5-6 level herniation of the protrusion type would include left arm and hand pain or weakness and pain radiating into the left arm and left side of the neck. After reviewing the April 21, 1998 Lady of the Sea General Hospital Emergency Department report, Dr. Sweeney opined eight months prior to April 21, 1998, Claimant had degenerative disc disease at the C5-6 level characterized by central and left paracentral herniation of the protrusion type resulting in mild left ventral cord impingement, which was caused by a chronic, pre-existing condition and not by a traumatic event in April 1998.

I find that Dr. Sweeney's opinions are unpersuasive as he based his opinions on the mistaken premise that Claimant had been suffering from cervical symptoms for the eight months prior to April 21, 1998. Moreover, I note Dr. Sweeney acknowledged that if Claimant has a heavy manual labor job, he would expect an aggravation of her pre-existing conditions. The record is clear that Claimant was engaged in heavy manual labor while she worked for Employer. Claimant further notes Dr. Sweeney testified if a patient has a pre-existing degenerative condition, symptoms increase when there is an aggravation of the underlying degenerative condition. To the contrary, Dr. Guidry, Claimant's treating physician, opined that the herniation at the C5 level indicated some type of trauma and that changes due to

degeneration occur at more than one level. Therefore, I find that Dr. Sweeney's testimony corroborates the conclusion that Claimant suffered an aggravation injury at work on April 20, 1998, as the symptoms related to her underlying degenerative condition increased at that time.

Employer/Carrier argue Dr. Guidry admitted that it cannot be determined from the MRI alone when Claimant's condition began. He further admitted symptoms of left-sided cervical herniation could include left arm numbness, left arm or hand weakness, pain radiating into the left arm, tightness in the left side of the neck and posterior left shoulder pain. Employer/Carrier note Dr. Guidry stated Claimant's cervical condition is related to her work if she did not have neck problems pre-existing April 21, 1998. Employer/Carrier point out Claimant's complaints prior to April 21, 1998 included left arm numbness and weakness, which Dr. Guidry stated could be indicative of a left-sided cervical herniation. Therefore, Employer/Carrier contend Claimant's cervical condition was pre-existing to April 21, 1998.

Dr. Guidry noted Claimant never had severe symptoms with her left shoulder and she never had any neck symptoms before April 21, 1998. Dr. Guidry's examination revealed mild spasm in her neck. The MRI indicated Claimant had left-sided disc herniation at the C5 level causing some ventral or anterior spinal cord compression. He observed the MRI findings indicated evidence of degenerative disc disease along with disc herniation. He opined the left-sided disc herniation indicated some sort of trauma as "most often cervical disc disease manifests by single traumatic episode to cause the disc to rupture."

Dr. Guidry confirmed if the findings in Claimant's neck were due solely to degenerative changes, then often there will be changes at more than one level. Since Claimant had degenerative changes at only one level, Dr. Guidry opined it is more likely than not that Claimant's disc herniation is the result of a traumatic event superimposed on a degenerative condition. Dr. Guidry confirmed an individual with a pre-existing herniated disc at the C5-6 level "may well" experience shoulder and neck pain after performing heavy manual labor.

Dr. Guidry confirmed left shoulder bursitis would not cause any type of cervical disc disease or degenerative condition and he would not relate left shoulder bursitis to Claimant's neck problems. He further confirmed Claimant's activities on April

20, 1998 would have aggravated any pre-existing degenerative disc disease. Therefore, assuming Claimant had no prior neck problems before working for Employer, Dr. Guidry would relate Claimant's complaints to her work with Employer.

I find Dr. Guidry's testimony and medical opinions to be persuasive and more reasoned than Dr. Sweeney's opinions. Dr. Guidry provided cogent explanations for the MRI findings and related Claimant's disc herniation to a traumatic episode. Furthermore, it is well-settled that the opinions of the treating physician should be afforded considerable weight. See, e.g., Loza v. Apfel, 219 F.3d 378, 395 (5th Cir. 2000). Even if the pain and weakness in Claimant's left arm and hand are symptoms of disc herniation at the C5-6 level caused by degeneration, I find that Claimant's work on April 20, 1998 aggravated her pre-existing condition. Claimant credibly testified the pain she suffered in her shoulder, arm and neck after April 20, 1998 was different than the pain she had suffered before April 20, 1998, and it was more severe pain. Employer's medic records and the medical records indicate Claimant had never complained of pain in her neck before April 20, 1998. Furthermore, Drs. Sweeney and Guidry stated Claimant's heavy manual labor job combined with her pre-existing condition would aggravate her degenerative disc disease. Therefore, I find and conclude that Claimant suffered a work-related traumatic event superimposed on a degenerative condition which was an aggravation of her pre-existing degenerative disc disease on April 20, 1998, and Employer/Carrier are responsible for this aggravation injury. See Strachan Shipping Co. v. Nash, supra.

D. Nature and Extent of Claimant's Disability

Based on the foregoing, I find that Claimant suffered an aggravation injury on April 20, 1998, within the course and scope of her employment with Employer. Therefore, I find and conclude that Claimant has sustained a disabling injury under the Act. However, the burden of proving the nature and extent of her disability rests with Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an

"incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if she has any residual disability after reaching maximum medical improvement (MMI). Trask, 17 BRBS at 60. Any disability suffered by Claimant before reaching MMI is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that she is unable to return to her regular or usual employment due to her work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). A claimant's present medical restrictions must be compared with the specific requirements of her usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once the claimant is capable of performing her usual employment, she suffers no loss of wage earning capacity and is no longer disabled under the Act.

The traditional method for determining whether an injury is permanent or temporary is the date of MMI. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of MMI is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches MMI when her condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Ltd., 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and MMI will be treated concurrently for purposes of explication.

The record indicates that Claimant has not been released to perform her usual employment by any physician.[3] Moreover, on June 30, 1999, Dr. Guidry opined Claimant cannot perform any work. Therefore, I find that Claimant has been temporarily disabled from the day she left her usual work with Employer due to her cervical symptoms on June 8, 1998, and continuing thereafter. Claimant is totally disabled from June 8, 1998, and continuing, except for those periods from July 1998 to May 1999 when she was working and, consequently, was temporarily and partially disabled under the Act.

Specifically, Claimant worked as a bartender for Northside Daiquiri from July 1, 1998 to August 14, 1998, and earned $120.00 per week. She next worked for Steve's Pub from August 15, 1998 to November 5, 1998, and earned $175.00 per week. She again worked for Northside Daiquiri from November 9, 1998 to March 25, 1999, and earned $135.00 per week. Finally, she worked for Night Deposit from April 8, 1999 to May 27, 1999, and

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[3] Dr. Guidry opined that assuming there was a solid fusion, he estimated a patient could return to light-duty work about 2 months post-operatively and would reach MMI about 6 to 8 months post-operatively. Dr. Sweeney opined barring any surgical complications, a patient could return to light-duty work with a cervical collar within a few weeks after neck surgery. However, neither physician has examined Claimant since her January 2001 surgical fusion.

earned $200.00 per week. I find that Ms. Seyler's February 9, 2001 labor market survey is premature as Dr. Guidry has not released Claimant to perform any type of work.

E. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910(a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed toward establishing a claimant's earning power at the time of the injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992). Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

The Act sets a high threshold and requires the application of Section 10(a) or 10(b) except in unusual circumstances. Section 10(a) is the presumptively proper method for calculating average weekly wage and must be employed unless it would be unfair or unreasonable to do so. Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, her annual earnings are computed using her actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, her average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). However, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821 (5th Cir. 1991).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar

> employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The administrative law judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P&M Crane Co., 23 BRBS 389, 393 (1990); Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity **at the time of injury**. Hall v. Consolidated Employment Services, Inc., 139 F.3d 1025, 1031 (5th Cir. 1998); Gatlin, supra at 823. The Fifth Circuit further observed that "typically, a claimant's wages at the time of injury will best reflect the claimant's earning capacity at that time. It will be an exceedingly rare case where the claimant's earnings at the time of injury are wholly disregarded as irrelevant, unhelpful or unreliable." Id.

In post-hearing briefs, the parties argue that Section 10(c) of the Act should be utilized to determine Claimant's average weekly wage. However, the parties arrive at different figures for the Section 10(c) average weekly wage calculation. As the record indicates Claimant did not work an entire year with Employer, and there are no wages of comparable workers similarly situated to Claimant in the submitted record, an average daily wage cannot be computed. Thus, Sections 10(a) and 10(b) of the Act cannot reasonably be applied. Accordingly, Section 10(c) will be applied to determine Claimant's average weekly wage.

The primary concern when applying Section 10(c) is to determine a sum which reasonably represents the earning capacity of the injured employee. Miranda v. Excavation Construction, Inc., 13 BRBS 882 (1981).

In the instant case, Claimant argues that she earned $3,800.47 during the 10.85 week-period she worked for Employer until the date of the injury on April 20, 1998. Claimant asserts this figure renders an average weekly wage of $350.17

($3,800.47 ÷ 10.85 weeks = $350.27 per week).[4] Claimant notes this calculation benefits Employer/Carrier as it does not include her "missed time" on 32 days which Claimant missed at least some part of the day, if not the whole day.

Employer/Carrier contend Claimant is entitled only to the minimum compensation rate of $208.90 as she averaged about $4,000.00 per year and did not file income tax returns from 1993 through 1997. Alternatively, Employer/Carrier argue her total earnings from her work from Employer until the injury on April 20, 1998 should be divided by the number of weeks she worked for Employer to determine her average weekly wage. Thus, Employer/Carrier note Claimant earned $3,800.47 while working 12 weeks for Employer, which renders an average weekly wage of $316.71 ($3,800.47 ÷ 12 weeks = $316.71 per week).[5]

The Board has held that a worker's average weekly wage should be based on her earnings for the seven or eight weeks during which she worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where she was injured would best adequately reflect the Claimant's earning capacity at the time of the injury. See Miranda, supra at 886.

Claimant's wage records indicate she began working for Employer on January 26, 1998 and was injured on April 20, 1998. (See EX-17). However, Claimant continued to work for Employer until June 7, 1998, as the wage records indicate she earned $5,724.39 until that date. She thus worked 19 weeks for Employer before she was injured and averaged $301.28 per week ($5,724.39 ÷ 19 weeks = $301.28 per week). Like Miranda, Claimant was earning more money weekly for the 19 weeks of employment with Employer when she was injured than she earned weekly in her previous five years of work as a wallpaper installer. Thus, I find as the Board did in Miranda, that a calculation based on her increased wages at the employment where she was injured "would best adequately reflect Claimant's

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[4] In her post-hearing brief, Claimant makes a computational error and argues $3,800.47 divided by 10.85 weeks renders an average weekly wage of $350.92.

[5] In their post-hearing brief, Employer/Carrier make a computational error and argue $3,800.47 divided by 12 weeks renders an average weekly wage of $316.70.

earning potential at the time of her injury." Accordingly, I find Claimant's average weekly wage was $301.28.

F. Medical Benefits

Pursuant to Section 7(a) of the Act, the employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. In order for Employer/Carrier to be liable for Claimant's medical expenses, the expenses must be reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984). Section 7 does not require that an injury be economically disabling in order for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.

An employer found liable for the payment of compensation is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986). If a work injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease or underlying condition, the entire resultant condition is compensable. See Strachan Shipping Co. v. Nash, supra.

In the present matter, Employer has been found liable for Claimant's April 20, 1998 work injury. Accordingly, Employer/Carrier are responsible for all reasonable and necessary medical expenses related to Claimant's aggravated cervical and degenerative disc disease conditions.

G. Section 8(f) Special Fund Relief

Section 8(f) of the Act limits Employer's liability to a claimant to one hundred and four (104) weeks if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury, and (3) which combined with the subsequent injury to produce or increase the employee's

permanent total or partial disability which is greater than that resulting from the first injury alone. Lawson v. Suwanee Fruit and Steamship Co., 336 U.S. 198 (1949); FMC Corporation v. Director, OWCP, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 110, 14 BRBS 716 (CRT) (4th Cir. 1982); Director, OWCP v. Sun Shipbuilding & Dry Dock Co., 600 F.2d 440, 10 BRBS 621 (CRT) (3d Cir. 1979); C&P Telephone v. Director, OWCP, 564 F.2d 503, 6 BRBS 399 (CRT) (D.C. Cir. 1977); Equitable Equipment Co. v. Hardy, 558 F.2d 1192, 6 BRBS 666 (CRT) (5th Cir. 1977); Shaw v. Todd Pacific Shipyards, 23 BRBS 96 (1989).

The provisions of Section 8(f) are to be liberally construed. Director v. Todd Shipyard Corporation, 625 F.2d 317, 12 BRBS 518 (9th Cir. 1980). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson, supra.

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Lawson, supra. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C&P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment-related accidents and compensation liability. Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836, 14 BRBS 974 (CRT) (9th Cir. 1982); Equitable Equipment Co., supra.

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Equitable Equipment Co., supra; see also Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd v. Todd Shipyards Corp., 16 BRBS 163, 167-68 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury. Currie v.

Cooper Stevedoring Co., 23 BRBS 420, 426 (1990). Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. Eymard & Sons Shipyard, supra; C.G. Willis, Inc. v. Director, OWCP, 31 F.3d 1112, 1116, 28 BRBS 84, 88 (CRT) (11th Cir. 1994). There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., 718 F.2d 886, 16 BRBS 85 (CRT) (9th Cir. 1985).

An injury or condition is manifest if diagnosed and identified in a medical record which provides the employer with constructive knowledge of its existence. Director, OWCP v. Vessel Repair, Inc. [Vina], 168 F.3d 190, 196, 33 BRBS 65, 70 (CRT) (5th Cir. 1999). The manifestation requirement will be satisfied where the employer can show that the pre-existing injury or condition had been documented or otherwise shown to exist prior to the second injury. American Ship Building Co. v. Director, OWCP, 865 F.2d 727, 732, 22 BRBS 15, 23 (CRT) (6th Cir. 1989). When medical records no longer exist, the testimony of a physician can be used as circumstantial evidence of their existence and the fact of a prior injury or condition and satisfy the manifestation requirement. Esposito v. Bay Container Repair Co., 30 BRBS 67, 68 (1996).

Section 8(f) will not apply to relieve an employer of liability unless it can be shown that an employee's permanent disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990). An employer must set forth evidence to show that a claimant's current permanent partial disability is **"materially and substantially greater than that which would have resulted from the subsequent injury alone**." Id. at 750 (emphasis added); 33 U.S.C. § 908(f)(1). If a claimant's permanent disability is a result of his work injury alone, Section 8(f) does not apply. C&P Telephone Co., supra; Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980). Moreover, Section 8(f) does not apply when a claimant's permanent disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 1316-17, 21 BRBS 150 (CRT) (11th Cir. 1988).

In the present matter, Employer applied to the District Director for Section 8(f) relief on February 8, 2001. (EX-1).

The medical evidence and Claimant's own testimony indicate Claimant indeed has an extensive history of pre-existing degenerative disc changes. (See, e.g., CX-5, pp. 34-35). Moreover, Dr. Sweeney testified Claimant's current disability is materially and substantially greater because of her pre-existing condition than her disability would have been from her cervical condition alone. (EX-2, p. 20). However, the record is evident that Claimant has not reached MMI and therefore remains temporarily disabled under the Act. Accordingly, the prerequisite that Claimant suffers from a **permanent** disability has not been established in the instant matter. See Lawson, supra. Therefore, Employer/Carrier have not established all the prerequisites for entitlement to Section 8(f) Special Fund relief. Thus, Employer/Carrier are not entitled to Section 8(f) Special Fund relief at this time.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[6] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for **temporary total disability** from **June 8, 1998** to **July 1, 1998**, from **November 5, 1998** to **November 8, 1998**, from **March 25, 1999** to **April 7, 1999**, and from **May 28, 1999**, **and continuing**, based on Claimant's average weekly wage of $301.28, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for **temporary partial disability** from **July 1, 1998** to **August 14, 1998**, based on two-thirds of the difference between Claimant's average weekly wage of $301.28 and her $120.00 wage-earning

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[6] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge should compensate only the hours spent between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 823 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for hours earned after **March 30, 2000**, the date the matter was referred from the District Director.

capacity, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

3. Employer/Carrier shall pay Claimant compensation for **temporary partial disability** from **August 15, 1998** to **November 5, 1998**, based on two-thirds of the difference between Claimant's average weekly wage of $301.28 and her $175.00 wage-earning capacity, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

4. Employer/Carrier shall pay Claimant compensation for **temporary partial disability** from **November 9, 1998** to **March 25, 1999**, based on two-thirds of the difference between Claimant's average weekly wage of $301.28 and her $135.00 wage-earning capacity, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

5. Employer/Carrier shall pay Claimant compensation for **temporary partial disability** from **April 8, 1999** to **May 27, 1999**, based on two-thirds of the difference between Claimant's average weekly wage of $301.28 and her $200.00 wage-earning capacity, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

6. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's April 20, 1998 work injury, pursuant to the provisions of Section 7 of the Act. 33 U.S.C. § 907.

7. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

8. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

9. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 23d day of October 2001, at Metairie, Louisiana.

A
LEE J. ROMERO, JR.
Administrative Law Judge